

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Review of the Pioneer's) ET Docket No. 93-266
Preference Rules)

To: The Commission

COMMENTS OF
ADVANCED CORDLESS TECHNOLOGIES, INC.

1. Advanced Cordless Technologies, Inc. (ACT) and its principals are no strangers to the concept of a pioneering effort relative to new technologies, nor to this Commission's regulatory program with regard personal communications services. ACT principal Matthew Edwards was formerly the President and Chief Executive Officer of Cellular 21, Inc., whose rulemaking petition initiated the PCS regulatory program and who was licensed to operate two of the three initial experimental operations relative to CT-2. Notice of Inquiry, 5 FCC Rcd. 3995, ¶¶1, 8, fn. 7 (1990).¹

2. ACT offers comments relative to the rulemaking notice released October 21, 1993.

¹ The Commission proposes to reject ACT's request for a pioneer's preference along with 52 other requesting parties in Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd. 7794 (1992).

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I.

Do not abort the pioneer's preference rules retroactively

3. The Commission should not abort the pioneer's preference rules retroactively (notice at ¶19). We advance three reasons for this.

4. First, such retroactive abandonment of the pioneer's preference rules would be exceedingly unfair to parties like ACT and Mr. Edwards who have devoted years of time, energy and unique talents -- and who have spent in excess of a \$400,000 -- in the course of their pioneering role in the PCS regulatory program. On this score, we echo the Congressional concern that the small business entrepreneur not get lost in the shuffle amidst the communications conglomerates who are players in the PCS sweepstakes. Four hundred thousand dollars to small business entrepreneurs like Mr. Edwards and individual investors in ACT is, relatively, a greater commitment to the development of PCS than, for example, the \$10 million budget which the Washington Post states it has for PCS development. Gen. Docket 90-314, Comments of American Personal Communications, dated January 29, 1993 at 2.

5. Second, the advent of competitive bidding does not provide a basis to eliminate the preference (notice at ¶7). Small business entrepreneurs such as ACT do not have the financial means to compete with entrenched communications conglomerates in the bidding process, which much favors the

latter over the former.² If the Commission is to carry out the legislative mandate to encourage participation in the PSC business by small business, minorities and women, in its treatment of the pioneers of PSC, the Commission should retain and apply the pioneer's preference rules to reward all parties who have contributed in a significant, innovative way to the new technology, and not just tell those pioneers that their reward is contingent upon successfully competing against mega-billion dollar corporations directly in competitive bidding or indirectly in the pursuit of investment dollars to bid against such corporations.

6. Third, repeal of the pioneer's preference rules as applied to PCS at this juncture is unlawful. Those rules were adopted by the FCC on its own initiative, not pursuant to any Act of Congress. The current rulemaking notice, while spawned in light of the Omnibus Budget Reconciliation Act of 1993 adding Section 309(j) to the Communications Act providing for the use of competitive bidding, does not mandate the FCC to take any action with respect to the pioneer's preference rules and for sure does not mandate or authorize the Commission to repeal or amend the rules and apply such action retroactively to parties who have participated in the previously announced PCS pioneer's preference

² Not all pioneering work (even though the work may be highly valuable) necessarily comes in a package that is readily saleable in the commercial marketplace, as the Commission appears to assume (notice at ¶7).

program. Indeed, Congress has expressed a neutrality with regard to the pioneer's preference program in light of the new legislation regarding competitive bidding (notice at ¶9). Under these circumstances, the Commission does not have the authority to repeal or change the rules and apply them retroactively here. Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468 (1988).

II.

Liberalize the pioneer's preference program rather than undermine it

7. The tenor of the notice reflects an apparent mindset at the Commission to distance itself from the pioneer's preference program. This is reflected in the text of the notice as well as in the dissenting and concurring statement of Commission Barrett. Such a tenor is a marked departure from the tenor of Commission pronouncements only two or three years ago regarding the usefulness of the program. Notice of Inquiry, supra (1990) (proposing preference rules at the initiation of an academic organization); Report and Order, 6 FCC Rcd. 3488 (1991) (adopting the preference rules based on highly favorable comments filed by a number of diverse parties including a variety of communications industry parties, trade associations, academics and professionals). If there is a valid basis for this abrupt and quick turnaround on the Commission's part, it certainly is not set forth in the notice.

8. We submit that the problem the Commission is having with

the pioneer's preference program is that the FCC is being too restrictive in its administration of the program. That program, as applied to PCS, should be expanded not diminished. The potential scope of PCS is massive. Indeed, PCS may have more impact on communications in our nation than any regulatory program in the Commission's history. Various parties have contributed in valuable ways to this process. Communications conglomerates have contributed with their extensive resources (money, technical staff, existing communications facilities at hand) providing more comprehensive R&D than smaller entrepreneurs can provide. Smaller entrepreneurs have brought their creative genius and early pioneering of ideas, concepts and experimentation to the table. PCS has come into being as a result of the innovative work of a number of parties, both large and small, and all who have made a significant contribution to the process should receive credit and be rewarded.

9. It is astonishing that for the PCS communications services, the Commission has awarded but a single pioneer's preference and proposes to award only three more preferences out of a some 70 parties whose pioneering work has sufficient merit to warrant detailed consideration by the Commission. The sole preference to date (out of 13 preferences considered) in the First Report and Order, 8 FCC Rcd. 7162 (1993), is the subject of petitions for reconsideration and notices of appeal raising the charge that this single selection has been an arbitrary and

capricious one. The 3 proposed preferences to date (out of 56 preferences considered) in the Notice of Proposed Rule Making and Tentative Decision, supra, if not greatly expanded in the Commission's final deliberations, it is fair to say, will likewise be the subject of the charge that such a limited selection is arbitrary and capricious.

10. Where there has been such widespread, meaningful contribution to the ideas and state the art resulting in the enormously important PSC communications services, the more reasoned and legally supportable agency decision-making is to award pioneer's preferences to each claimant, large and small, who has made a significant contribution to that process, and not attempt to single out only one or a favored few when this, of necessity, must disregard valuable pioneering contributions by other parties. For example, one has to believe that the filing of the seminal petition for rulemaking leading to the very establishment of PCS program and the related pioneering experimentation in support of that petition merits a pioneer's preference to ACT, without regard to its innovations in advancing CT-2 technologies which ACT also brought to the table here. Comparable analyses may be made for various other parties who have made presentations in support of their claims.

11. For all of these reasons, we urge the Commission to abandon its apparent intent to withdraw from the pioneer's preference program and, instead, to apply the pioneer's

preference in a more comprehensive, fair manner to include all who have made meaningful pioneering contributions to the development of PCS.

Respectfully submitted,


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